Supreme Court, U.S.
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NO. 94 384

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HERBERT D. BERKSON,

Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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27pp

QUESTIONS PRESENTED FOR REVIEW

Can the Plaintiff, The United States of America, be compelled to bring to the attention of the Court a fraud perpetrated upon said Court in order to bring about a purchase and sale of the United Fruit divestiture properties which were the subject of the Final Judgment, and can the Plaintiff be compelled to uphold the terms of the Final Judgment, and can the Plaintiff be compelled to enforce the violations thereof, and can the Plaintiff be compelled to hold said Defendant, United Fruit Company, in contempt of said decree?

Can the United States Government deprive the Petitioner, Berkson, of his property rights without due process in violation of the Fourteenth Amendment to the United States Constitution?

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I. STATEMENT OF JURISDICTION TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Under Rule 10 of the Rules of the Supreme Court of the United States, jurisdiction of this case is respectfully requested by your Petitioner on the basis that the Circuit Court of Appeals for the Fifth Circuit

> "Has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision."

II. CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution states in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

III. STATEMENT OF CASE

This is an historic landmark case that will afford the American public as well as the Senate Intelligence Committee a rare opportunity to deeply scrutinize the Central Intelligence Agency's (C.I.A.) inner workings and possible abuses for which the American taxpaying public spends billions of dollars annually to support without accountability on the part of the CIA if the Court grants certiorari to your Petitioner, Berkson.

The United States Central Intelligence Agency in the name of sometime questionable national security concerns was able to maintain and preserve its intelligence covers in Guatemala and Panama through its proprietaries and agents, the United Fruit Company and the Del Monte Corporation as well as their respective law firms that were dragooned into rogue federal service to mislead and blind the presiding judges by fallacy in the Petitioner's prior cases.

The C.I.A. and its agents, United and Del Monte, were eminently successful in thwarting the Petitioner's legitimate efforts to purchase the United Fruit divestiture properties in Guatemala, CA that by official Guatemalan mandate he was allowed to purchase while Del Monte was denied. By depriving the Petitioner of his right to purchase said properties, the United States Government deprived him of his Constitutional rights guaranteed by the Constitutional Fourteenth Amendment. Official U.S. State Department declassified documents that are part of the court record will attest to this fact. Further, prior court pleadings will also attest to the fact that the C.I.A., the United Justice and State Departments actively encouraged Del Monte and United to bribe the then president of Guatemala Carlos Arana for $500,000 in order for him to reverse his original denial to Del Monte to purchase said

United Fruit divestiture properties. (circa 1972)

Del Monte was designated as the preferred purchaser of said Guatemalan properties by the C.I.A. and the U.S. State Department rather than the Petitioner because Del Monte agreed to allow the C.I.A.'s intelligence cover to remain on the banana plantation properties formerly belonging to United Fruit in Guatemala.

Del Monte in collusive concert with the C.I.A. bribed president Arana of Guatemala in 1972 using the C.I.A. operative General Manuel Noriega's Banco Nacional de Panama as the money laundering agent for the $500,000 bribe to Arana. The bank issuing the half-million in checks that were eventually transmitted to President Arana was the City National Bank of Miami that the Wall Street Journal reported was linked both to the Central Intelligence Agency and its affiliate the notorious and sinister rogue

international bank, the Bank of Credit and Commerce International (BCCI), whose accounts the C.I.A. used to transmit its clandestine and covert monies in some cases.

Your Petitioner was innocently caught up in the vortex of the Iran Contra, BCCI and Manuel Noriega affairs, a sacrificial lamb on the altar of American political and geo-political policy during the height of the Cold War with the Soviet Union.

The Court must not allow the American intelligence community to pervert and prostitute the legal process.

The Court should rule that the Government should not be able to profit from its own fraud by using the statute of limitations to bar the Petitioner's claims.

The Judiciary can not shirk its constitutional responsibilities because a decision may have significant political overtones. The Court must preserve constitutional integrity.

The Petitioner has not been able to get competent counsel to represent him before the Court at this time because most lawyers fear reprisals from the dirty tricks department of the C.I.A., even assassination. However, the Petitioner's former counsel, Joseph Dow, will represent him before the Court if certiorari is granted by the Court.

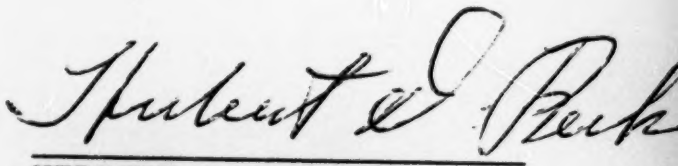
The Petitioner believes that this matter is so historically significant that the facts should be allowed to be revealed before the public in an open courtroom.

IV. CONCLUSION

For the reasons stated above the order of the Circuit Court of Appeals for the Fifth Circuit affirming the dismissal of the Petitioner's Petition for Writ of Mandamus in the District Court of the Eastern District of Louisiana should be vacated and Certiorari be granted in order that a hearing be held on the Petitioner's Petition for Writ of

Mandamus in the District Court of the Eastern District of Louisiana.

By the Petitioner,



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A P P E N D I X

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3537

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

UNITED FRUIT COMPANY,

Defendant,

HERBERT D. BERKSON,

Movant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana (CA 93-30 "D" (1))

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Herbert D. Berkson filed a petition for a writ of mandamus. The District Court dismissed Berkson's suit. Berkson appeals. We affirm.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

On July 2, 1954, the United States initiated a proceeding in Louisiana Federal District Court charging United Fruit Company with violations of 1 and 2 of the Sherman Act. The parties eventually agreed to a consent decree which was entered as a final judgment. Pursuant to the consent decree, the United Fruit Company was required to divest itself of a portion of its Central American banana properties. United Fruit Company eventually decided to divest itself of a portion of its Guatemalan banana properties; Del Monte and Berkson's Pan Tropic Fruit Company submitted bids on the Guatemalan properties. In 1972, the Guatemalan government approved the sale of the Guatemalan properties to Del Monte.

The District Court then held a hearing to consider the proposed sale. At the hearing, Berkson appeared as amicus curiae and argued that the Court should not approve

the sale to Del Monte. The District Court approved the sale, which was finalized on December 14, 1972.

In 1978, upon motion of the parties, the District Court modified the consent decree. The modified consent decree provided that judgment would remain in effect "until ten years after the divestiture by (United Fruit Company) of its Bananera Guatemala plantations to Del Monte Corporation, which was consummated on December 14, 1972. This Modified Final Judgment shall thereafter be of no force or effect."

Del Monte's purchase of United Fruit Company's Guatemalan properties has led Berkson to pursue a relentless course of litigation seeking to void the sale of the Guatemalan properties to Del Monte. In 1979, Berkson filed an antitrust complaint in a Massachusetts Federal District Court against United Brands--United Fruit Company's successor--and Del Monte alleging that the

companies had conspired to exclude other companies from purchasing the Guatemalan properties. The District Court granted summary judgment on the ground that the action was time barred. The First Circuit upheld the District Court's determination. Berkson v. Del Monte Corp., 743 F.2d 53 (1st Circ. 1984), cert. denied, 470 U.S. 1056 (1985).

Since Berkson's first suit seeking to void the sale of the Guatemalan properties to Del Monte, he has apparently brought three other suits in Massachusetts Federal District Court concerning the sale of the Guatemalan properties. All of these suits were ultimately dismissed and affirmed by the First Circuit. The present suit represents Berkson's latest attempt to void the sale of the Guatemalan properties.

In the instant case, Berkson filed a Petition for Writ of Mandamus in Louisiana Federal District Court, the Court which

originally entered the consent decree in 1958. In his petition for mandamus, Berkson asked that "the Plaintiff, the United States of America, be compelled to uphold the terms of the Final Judgment and enforce the violations thereof and hold said Defendant in contempt of the decree." Berkson alleged that the District Court had jurisdiction over the case pursuant to 28 U.S.C. 1361.

The government filed a motion to dismiss Berkson's Petition for Writ of Mandamus. The District Court granted the government's motion. The District Court determined that because the decision to enforce the terms of a consent decree is a discretionary governmental action, Berkson did not have standing to compel the United States to enforce the consent decree. The District Court further determined that it did not have subject matter jurisdiction over a suit in which the United States is the Plaintiff unless the suit is brought by the attorney

general. Berkson then filed a motion for reconsideration. The District Court stated that as of the filing of the Notice of Appeal it did not have jurisdiction over the case, and that even if it did decide to reach the merits of Berkson's motion to reconsider, it would deny the motion.[1]

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[1]The District Court's judgment was entered on July 12, 1993, and Berkson's supplemental memorandum to his motion to reconsider was served on July 20, 1993. Even though the District Court declined to enter Berkson's original motion to reconsider into the record because of deficiencies, the supplemental motion to reconsider was entered into the record. Because Berkson has not appealed the District Court's ruling on his motion to reconsider, we do not address the propriety of the District Court's decision that the Notice of Appeal filed in the case divested that court of jurisdiction. See FED. R. APP. P. 4 (1) (4) (f) (stating that "[a]ppellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed Notice of Appeal"). Furthermore, once Berkson's supplemental motion to reconsider was ruled upon, his previously filed notice of appeal was sufficient to place jurisdiction with the Court. FED. R. APP. P. 4 (1) (4); see also Burt v. Ware, 14 F.3d 256 (5th Cir. 1994).

II.

Berkson argues on appeal that the District Court erred in dismissing his Petition for Writ of Mandamus because even though the government may have discretion as to what actions it may bring, it does not have discretion as to whether it can refuse to enforce the consent decree. Specifically, Berkson argues that

> this discretion does not apply, nor are there any authorities known to [Berkson] to support the Department of Justice's position that even though an action which has been commenced by them and gone to judgment, the Department of Justice can, at that juncture, refuse to enforce the decree by bringing to the attention of the Court a fraud practiced on the Court, which fraud vitiates the Judgment and the decree and order thereon. To allow this position to stand would violate the Constitution and provisions of separation of the Executive and Judicial Branches of the United States Government, in that, as in this case, the Executive would not be required to carry out and enforce the decrees and orders as set forth by the Judiciary.

We note initially that in his Petition for Writ of Mandamus Berkson clearly requested the District Court to enforce the consent decree. However, it is well settled "that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefitted by it." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975). Berkson has not pointed us to any provision of the consent decree or the modified decree which grants a non-party, such as Berkson, standing to enforce its provisions, and we have not found any. Accordingly, Berkson did not have standing to enforce the consent decree.

Berkson's argument on appeal is further eroded by his attempt to bring a mandamus action. Berkson's Petition for Writ of Mandamus was an attempt to require the United States to enforce the consent decree. Berkson asserted that the District Court had

the power to grant his requested relief pursuant to § 1361, which provides that the "[d]istrict courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff." However, § 1361 confers jurisdiction on a District Court only when the official or agency owes a specific duty to the party seeking mandamus relief. Kirkland Masonry, Inc. v. Commissioner, 614 F.2d 532, 533-34 (5th Cir. 1980). The duty must be "'clear, ministerial and non-discretionary.'" Id. at 534 (quoting Mattern v. Weinberger, 519 F.2d 150, 156 [3d Cir. 1975]). "Because there is no presumption in favor of Federal Court jurisdiction and that jurisdiction is limited, the basis for jurisdiction must be affirmatively shown." Id. at 533. Berkson has not alleged what duty was created in his favor such that he could compel the

government to enforce the consent decree, and we have not found one. Because Berkson has failed to establish that the government owed him a duty which may be enforced by a writ of mandamus, and because he has failed to establish any other basis for the District Court to assume jurisdiction over this case, the judgment of the District Court dismissing for lack of subject matter jurisdiction is affirmed.

III.

The government requests that this Court impose sanctions against Berkson in the amount of $1,600, pursuant to Federal Rule of Appellate Procedure 38, for filing a frivolous appeal. "An appeal is frivolous if the result is obvious or the arguments of error are wholly without merit." Coghlan v. Starkey, 852 F.2d 806, 811 (5th Cir. 1988). We are particularly cautious in awarding sanctions against pro se litigants. However,

even pro se litigants are not allowed to bring a frivolous appeal.

Berkson has filed numerous lawsuits attempting to void the sale of the Guatemalan properties to Del Monte. This lawsuit was merely another attempt to void the sale. In addition to the fact that the District Court lacked subject matter jurisdiction, it is unlikely that Berkson's suit was viable because the First Circuit already determined that the allegations of fraud which he raised in this case were barred by the statute of limitations. Further, because the consent decree as modified appears to have expired in 1982, it does not appear that there is anything for anyone to enforce. The fact that this suit is merely an attempt to make an end run around the unfavorable decisions reached in Berkson's earlier suits is clearly evidenced by his reply brief in this Court in which he spends most of his argument attacking the earlier decision of the First

Circuit, which dismissed his antitrust suit. Therefore, we conclude that Berkson's appeal of the District Court's decision is frivolous, and we award $1,600 as a sanction.

IV.

For the foregoing reasons, the judgment of the District Court is AFFIRMED. Further, because the appeal is frivolous, we assess $1,600 in sanctions against the appellant.

MINUTE ENTRY
McNAMARA, J.
JULY 9, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CIVIL ACTION
	*	
VERSUS	*	NO. 93-30
	*	
UNITED FRUIT COMPANY	*	SECTION "D" (6)

Before the court is the Motion of the United States of America to Dismiss Writ of Mandamus. Petitioner Herbert Berkson has filed an opposition and a supplemental memorandum. The matter is before the court on briefs, without oral argument.

Petitioner has asked this court to compel the United States to enforce a final judgment reached in United States v. United Fruit Company in 1958. The decision to enforce the terms of a final judgment is discretionary and lies with the United States Department of Justice. See, e.g., Dresser Industries, Inc. v. United States, 596 F.2d 1231, 1237 (5th Cir. 1979), reh'g denied, 601

F.2d 586, cert. denied, 444 U.S. 1044 (1979). Petitioner lacks standing to compel the United States to perform a discretionary act. Ross v. United States Attorney's Office, C.D. of Cal., 511 F.2d 254 (9th Cir. 1975).

Moreover, this court does not have subject matter jurisdiction over suits in which the United States is the plaintiff unless the suit is brought by the Attorney General. Marshall v. Gibson's Products, Inc., 584 F.2d 668, 676 (5th Cir. 1978). The United States did not institute this action. Accordingly;

IT IS ORDERED that the Motion to Dismiss Writ of Mandamus be GRANTED, DISMISSING the Petition with prejudice at the cost of Petitioner.

DATE OF ENTRY JUL 12 1993